UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

RAMON ARMAS BORROTO, JR.

Plaintiff,

vs. **Case No. 5:04CV165-RH/WCS**

MCDONALD, PATE, SPEIGHT, MCKENZIE and KENT.

Defendants.
_____/

Defendants' Motion for Reconsideration of Motion to Dismiss For Failure to Exhaust Administrative Remedies in Light of Eleventh Circuit Authority: Johnson v. Meadows, 2005 U.S. App. LEXIS 15233, or, in the alternative, Motion to Certify Interlocutory Appeal pursuant to 28 U.S.C. 1292(b)

Defendants,[1] by and through undersigned counsel, move for reconsideration of Defendant's Motion to Dismiss Plaintiff's amended complaint for failing to exhaust administrative remedies in light of recent Eleventh Circuit authority: Johnson v. Meadows, 2005 U.S. App. LEXIS 15233 (presented as Exhibit A for the benefit of the pro se inmate). The Johnson opinion makes clear that the PLRA's exhaustion requirement is **procedural in nature** and "entirely eliminates judicial discretion and instead mandates strict exhaustion." Johnson, 2005 U.S. App. LEXIS 15233, * 7. In the alternative, Defendants request certification of an interlocutory appeal of the Court's order denying Defendants' motion to dismiss (Doc. 42) or an order which would deny the Defendants' instant motion for reconsideration.

[1] Nothing in this motion shall be construed as an appearance on behalf of or a waiver of service of process as to any unserved or improperly served persons or entities.

STATEMENT OF FACTS

Defendants previously moved to dismiss Plaintiff's amended complaint, arguing that Plaintiff had failed to demonstrate exhaustion of administrative remedies for his claims. Doc. 24. Plaintiff has alleged that on November 28, 2002, he was placed in handcuffs, removed from his close management cell, and taken to the nurses' station[2] by Correctional Officers McDonald and Pate where he was repeatedly punched, pushed, and hit by Officer McDonald in the presence of Officer Pate, Officer Speight, Nurse Kent and Sergeant McKenzie. Doc. 19.

Defendants investigated Plaintiff's grievance records to locate grievances regarding staff abuse at Washington C.I. Doc. 24, at pp. 3-4. No grievance regarding staff abuse had been filed between November 28, 2002 and February 1, 2003 at the Department's Central Office. No grievance regarding any staff abuse had been filed between November 28 and December 19, 2002 at Washington C.I. Doc. 24, at p. 3. Plaintiff did file a grievance complaining about discipline, but that grievance was returned because Plaintiff had not filed an informal grievances. Doc. 24 (Exhibit C). At Santa Rosa C.I. a review of the grievance log for the period of time between December 19, 2002 and December 10, 2003, indicated that Plaintiff filed only one grievance between December 2002 and January 2003. In that sole grievance, Plaintiff complained that CM inmates were being punished when they ordered from the canteen. Doc. 24, at

[2] In an earlier complaint, Plaintiff alleged he was taken to a hearing room. Doc. 1.

pp. 3-4. As support, Defendants submitted an affidavit from staff in the Bureau of Inmate Grievance Appeals, and grievance logs from Washington C.I. and Santa Rosa C.I. Doc. 24.

Plaintiff responded to Defendants' motion to dismiss, alleging that he had in fact filed an emergency grievance to Central Office on December 2, 2002, four days after the alleged incident, and the grievance log number was 02-12025. Doc. 29. Defendants were therefore directed to submit a legible photocopy of the grievance which was logged as number 02-12025. Doc. 32. Defendants produced grievance log number 02-12025. In the grievance, which was dated November 13, 2002 (14 days before the alleged incident), Plaintiff wrote the following:

> Issue: This is a complaint challenging disciplinary action applied against me while assigned to close management III status. I am being denied personal property, canteen, visitation, day room privileges and work assignment because officials here at Wash. C.I. are unlawfully carrying over disciplinary confinement time that was assessed prior to my placement on Close Management. This is contrary to Osterback v. Moore, (C.M. is not punishment) and contrary to the Florida Administrative Code which authorizes d.c. or close management not both. Remedy or injunction sought in U.S. Dist. Ct. Doc. 33 (Exhibit A)

Plaintiff's grievance regarding his disciplinary status (not any particular disciplinary action) was returned without action because he had failed to comply with rule 33-103.014, Florida Administrative Code. Doc. 33 (Exhibit A)

In response to Defendants' production of his grievance which undeniably contained no allegation of physical abuse by staff at Washington C.I., Plaintiff explained that he had been under the impression that grievance log number 02-12025 was his purported emergency grievance. Doc. 35, at p. 2. Nevertheless, Plaintiff continued to maintain that on December 2, 2002 he filled out an emergency grievance and placed it in the prison's internal mailing system to be mailed directly to the Secretary of the Department of Corrections. Doc. 35. Plaintiff alleged that Captain John Doe and Nurse Jane Doe visited him on December 6, 2002, and that Captain Doe had the emergency grievance in his hand "when it should have been mailed to the Secretary of F.D.O.C." Doc. 35, at p. 1. Plaintiff said that Captain Doe "presented him" with the grievance and questioned him. Doc. 35, p. 1. Plaintiff alleged that he filed another emergency grievance to the Secretary, but gave no date and offered no factual support for this allegation. Doc. 35, at p. 2. Plaintiff's basic assertion was that his emergency grievances were somehow intercepted never processed. Doc. 35, at p. 2.

The Magistrate surmised that:

> If Plaintiff did indeed submit a grievance, even if it was not responded to be the Department, and if Plaintiff also alerted prison officials to his claim through an investigation by the Inspector General's office, then it is not readily apparent that this case should so quickly be dismissed for failure to exhaust administrative remedies. The Department of Corrections' Administrative Rules provide that an inmate may submit three types of grievances directly to the Office of the Secretary: (1) an emergency [footnote omitted] grievance; (2) grievance of reprisal; or (3) grievance of a sensitive

> nature. Rule 33-103.0007(6)(a). Accepting Plaintiff's argument that his emergency grievances should have never ended up in the hands of an officer at Plaintiff's prison, it is not clear that Plaintiff's case should be dismissed if his efforts at exhaustion were prevented by prison officials. It is also difficult to dismiss this case if Plaintiff's claim was investigated by the Inspector General's Officer despite the inability to demonstrate exhaustion through the usual procedures.

Doc. 36, at pp.3-4.

The Court then ruled that:

> To determine whether Plaintiff's case should go forward or not, Defendants will be required to provide the Court and to Plaintiff all documents related to the Investigation conducted by the Inspector General's Officer concerning Plaintiff. Furthermore, should review of this Investigation filed demonstrate that Plaintiff's transfer was related to the Investigation and his complaints of abuse by prison officials at Washington C.I., those documents relevant to the transfer shall also be provided.

Doc. 36, at pp. 5-6.

Complying with the Court's directive, Defendants submitted the report of the Inspector General. Doc. 37. Defendants also submitted e-mail correspondence between Washington C.I. and the Department's Central Officer referencing Plaintiff's transfer to Santa Rosa Correctional Institution. Doc. 37. The investigation demonstrated that Plaintiff had not attempted to exhaust his administrative remedies through the Chapter 33-103, Florida Administrative Code. Doc. 37.

On June 1, 2005, the Magistrate issued another Report and Recommendation. The Magistrate acknowledged that grievance number 02-12025 does not establish that Plaintiff presented his claim to prison officials. Doc. 38, at p. 4. The Magistrate further acknowledged that **"[t]his record does not contain a copy of any other written grievance."** Doc. 38, at p. 5 (emphasis added). Nevertheless, the Magistrate recommended that Defendant's motion to dismiss be denied. Doc. 38. at p. 8.

Specifically, the Magistrate found that an Incident Report prepared by Captain Scott in the Inspector's Investigation Report (Doc. 37, ex A, p. 11) provided evidence that Plaintiff had "alerted prison officials to his claim of physical abuse in late November, 2002, and that an Inspector General's investigation, originating from the Secretary's office in Tallahassee, was begun in early December, 2002." Doc. 38, at p. 5. Using the word "grievance" generally, and presumably not in reference to its use in Chapter 33-103, the Magistrate stated:

> . . . whether or not a paper grievance was filed in this particular case overlooks the practical effect of the Inspector General's investigation. Plaintiff's grievance was taken seriously by Captain Scott at the institutional level and resulted in an investigation by the Inspector General, who acts on behalf of the Secretary. All administrative levels of the Department of Corrections considered the merits of Plaintiff's grievance. Thus, the purposes of the requirement that all levels of the grievance process be exhausted have been fulfilled in this case.

Doc. 38, at p. 7.

Defendants objected to the Report and Recommendation. Doc. 41. Defendants

argued:

> "An inmate incarcerated in a state prison, thus, must first comply with the grievance procedures established by the state department of corrections before filing a federal lawsuit under section 1983." Miller v. Tanner, 196 F.3d 1190, 1193 (11th Cir.1999). Section 1997e(a) includes a procedural default component.[3] "[T]he determination whether a prisoner has "properly" exhausted a claim (for procedural default purposes) is made by evaluating the prisoner's compliance with the prison's administrative regulations governing inmate grievances, and the waiver, if any, of such regulations by prison officials." Spruill at 222.

Defendants stated that:

> Examination of the Florida Department of Corrections grievance procedure demonstrates that Plaintiff did not fulfill the exhaustion requirement and his claim must be barred. Rule 33-103.001 establishes the general policy for the grievance procedure. It provides:
>
> (1) The purpose of the grievance procedure is to provide an inmate with a channel for the administrative settlement of a grievance. In addition to providing the inmate with the opportunity of having a grievance heard and considered, this procedure will assist the department by providing additional means for internal resolution of problems and improving lines of communication. ***This procedure will also provide a written record in the event of subsequent judicial or administrative review.***
> 33-103.001, F.A.C. (emphasis added)
>
> Thus, the Florida administrative grievance procedure does not provide for oral communications. This fact is further illustrated by the grievance procedures' definition of a

[3]In footnote 3 of the Objections, Defendants acknowledged that there was split among the circuits on the procedural default point and cited the competing authorities. Doc. 41, at pp. 3-4.

> grievance as a "***written*** complaint or petition, either informal or formal, by an inmate concerning an incident, procedure, or condition within an institution, facility or the Department which affects the inmate complainant personally." Rule 33-103.002, F.A.C. (emphasis added.)

Doc. 42, at pp. 4-5.

Addressing the Magistrate's reliance on the Inspector General's investigation, Defendants explained:

> It is true that the IG's investigation may either substantiate or fail to substantiate an inmate's claim as it is a fact-finding process. It may not, however, alert prison administrators to collateral issues raised by the inmate's complaint such as the need to reassign staff from a particular location or the need to conduct additional staff or inmate training. It deprives the institutional level officials of the opportunity to administratively settle the grievance without resort to additional expensive resources, and it deprives both prison administrators and inmates of a means for improving lines of communication.
>
> "The Florida legislature has delegated to the Department of Corrections (the "DOC") the duty to establish inmate grievance procedures. See Fla. Stat. Ann. § 944.09(1)(d) ("The department has authority to adopt rules . . . to implement its statutory authority. The rules must include rules relating to . . . grievance procedures which shall conform to 42 U.S.C. s. 1997e. [**17] "); id. § 944.331 ("The department shall establish by rule an inmate grievance procedure that must conform to the Minimum Standards for Inmate Grievance Procedures as promulgated by the [*1288] United States Department of Justice pursuant to 42 U.S.C. s. 1997e. The department's office of general counsel shall oversee the grievance procedures established by the department."). The DOC has established such grievance procedures. See Fla. Admin. Code Ann. §§ 33-103.001 to -103.019. Subject to certain exceptions not applicable in this case, an inmate who wishes to complain about a condition of

> confinement must first file an "informal grievance . . . to the staff member who is responsible in the particular area of the problem." Chandler v. Crosby, 379 F.3d 1278, 1287-1288 (11th Cir. 2004).
>
> The Florida Department of Corrections provides a three-step grievance procedure. First, an inmate must normally file an informal grievance. See Rule 33-103.005, F.A.C. That informal grievance can not be an oral one. It must be written. See Rule 33-103.002, F.A.C. Many complaints are resolved at this stage of the grievance procedure. If the issue is not resolved, the inmate must then file a formal grievance at the institutional level. See Rule 33-103.006, F.A.C. If the matter is not resolved at the institutional level, the inmate must file an appeal to the Office of the Secretary of the Florida DOC. See Rule 33-103.007, F.A.C. Nothing in the Florida grievance procedure excludes allegations of staff abuse from its coverage. Inmates may grieve any "incident" which affects them personally, as well as "procedures" or "conditions." See Rule 33-103.001(3)(d), F.A.C. (providing that inmates can file complaints regarding "incidents occurring within the institution that affect them personally")

Doc. 41, at pp. 6-7.

On July 8th, one day later, the District Court Judge adopted the Report and Recommendation, and denied Defendants' motion to dismiss. Doc. 42

On July 26, 2005, the Eleventh Circuit issued Johnson v. Meadows, 2005 U.S. App. LEXIS 15233. Defendants now respectfully request that the Court review the 1997e(a) issue in the context of the Johnson opinion.

MEMORANDUM OF LAW

This Court has found that Plaintiff has "exhausted" his claims for purposes of 42 U.S.C. § 1997e(a), not through the Department's designated grievance procedure (Chapter 33-103, Florida Administrative Code), but by virtue of Plaintiff's verbal communication with Captain Scott which triggered an Inspector General's investigation. The Johnson opinion supports reversal of this ruling and dismissal of Plaintiff's claims under § 1997e(a). As seen by the holding in Johnson, the statute requires dismissal of inmate claims that are not completely exhausted through the Department's designated administrative grievance procedure.

In Johnson, the Court addressed the issue of how a claim is properly exhausted under the PLRA. The Court stated:

> . . .This issue is one of first impression in our circuit and essentially asks what exhaustion requires [*2] under the PLRA - simple exhaustion, or something more, such as "proper exhaustion." See Spruill v. Gillis, 372 F.3d 218, 228 (3rd Cir. 2004). The question also implies whether there is a procedural default concept within the PLRA's exhaustion requirement. Because we conclude that an untimely administrative grievance does not satisfy the exhaustion requirement of the PLRA, we reverse the district court's order and remand this case with directions that the district court dismiss Johnson's complaint.

Johnson, 2005 U.S. App. LEXIS at * 1-2. In Johnson the Court explained that the PLRA's exhaustion requirement is **procedural in nature**. Id. at * 7.

In Johnson, prison wardens sued by a Georgia inmate filed a motion to dismiss inmate Johnson's section 42 U.S.C. 1983 case for failure to exhaust administrative remedies, arguing that Johnson's untimely use of prison grievance procedures meant that he had not exhausted his administrative remedies. Id. at *4. The federal court granted the wardens' motion to dismiss only to the extent that they were being sued in their official capacities. The court concluded that inmate Johnson had otherwise properly exhausted his administrative remedies before filing suit. Id. at *5. The wardens filed a motion for certification for interlocutory appeal on the issue of "whether the failure of a plaintiff to grieve timely requires a dismissal of a federal suit with prejudice, when the prisoner did not follow internal grievance procedure initially, and upon a subsequent filing of an out-of-time grievance, the prison administrators find no grounds (or good cause) to authorize said out-of-time grievance." Id. at *5-6. The district court granted the motion for certification, and the Eleventh Circuit granted permission for the interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

On appeal, the Court held that section 1997e(a) "entirely eliminates judicial discretion and instead mandates strict exhaustion, 'irrespective of the forms of relief sought and offered through administrative avenues.'" Johnson, 2005 U.S. App. LEXIS at * 8 (quoting Booth v. Churner, 532 U.S. 731, 741 n.6, 121 S. Ct. 1819, 1825 n.6, 149 L. Ed. 2d 958 (2001))(emphasis added). To effectuate the intent of Congress to afford prison officials time to address grievances internally before allowing a prisoner to initiate a

federal lawsuit, the Court recognized that "whatever the precise contours of **what** exhaustion requires, it is plainly procedural in nature." Id. at *8. In looking at the issue of the Johnson case, the Court recalled its words in Brown v. Sikes, 212 F.3d 1205, 1207 (11th Cir. 2000), that:

> when a state provides a grievance procedure for its prisoners, as Georgia does here, an inmate alleging harm suffered from prison conditions must file a grievance and exhaust the remedies available under that procedure before pursuing a § 1983 lawsuit.

Johnson, 2005 U.S. App. LEXIS at * 9.

The Court also found Harper v. Jenkin, 179 F.3d 1311 (11th Cir. 1999), persuasive and reviewed the facts of that case, stating:

> . . . .In Harper, the prisoner filed an administrative grievance alleging that prison officials violated his rights under the Eighth and Fourteenth Amendments by refusing him needed medical treatment. Id. at 1312. The Georgia prison officials denied his grievance because it was untimely. Id. The prisoner could have appealed the officials' denial of his grievance, but he acknowledged that the appeal would not be heard because his grievance was untimely. Id. Therefore, the prisoner argued that he had exhausted his administrative remedies. Id. We disagreed, noting, as did the district court, that the Georgia State Prison Inmate Grievance Procedure "allows the grievance coordinator to waive the time period for filing a grievance if 'good cause' is shown." Id. at 1312. "Since [the prisoner] has not sought leave to file an out-of-time grievance, he cannot be considered to have exhausted his administrative remedies." Id. We noted that "if we were to accept [the prisoner's] position - that the filing of an untimely grievance exhausts an inmate's administrative remedies - inmates, such as [the prisoner], could ignore the PLRA's exhaustion requirement and still gain access to federal court

> merely by filing an untimely grievance." Id. Therefore, we affirmed the district court's order of dismissal.

Johnson, 2005 U.S. App. LEXIS at * 9-10.

From there the Court acknowledged that it had not "directly addressed the issue of whether an untimely grievance that is rejected as such by prison officials can satisfy the exhaustion requirement of § 1997e(a)." Id. at *11. In looking to its sister circuits, the Court agreed with those circuits that "have concluded that an untimely grievance does not satisfy the exhaustion requirement of the PLRA." Id. at * 11.[4] The Court thus held that "the PLRA's exhaustion requirement does contain a procedural default component: Prisoners must timely meet the deadlines or the good cause standard of Georgia's **administrative grievance procedures** before filing a federal claim." Id. at * 16.

By recognizing the procedural default component of 42 U.S.C. § 1997e(a), the Eleventh Circuit in Johnson has directly, if not implicitly, deemed proper exhaustion of administrative remedies limited to the process established by the state for the exhaustion of administrative grievances. Further support for this is found in Chandler v. Crosby, a Florida case where the Eleventh Circuit recognized Florida's designated grievance procedure as the process found in Florida Administrative Code Chapter 33-103. In

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[4] The Court reviewed favorably the reasons underlying the decisions in Ross v. County of Bernalillo, 365 F.3d 1181,1186 (10th Cir. 2004), Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir.), cert. denied 537 U.S. 949, 154 L. Ed. 2d 293, 123 S. Ct. 414 (2002), Spruill v. Gillis, 372 F.3d 218, 228 (3d Cir. 2004), and the dissent of Judge Rosen in Thomas v. Woolum, 337 F.3d 720, 746 (6th Cir. 2003). See Johnson, 2005 U.S. App. LEXIS at * 12-16.

Chandler, the Court stated:

> . . .The Florida legislature has delegated to the Department of Corrections (the "DOC") the duty to establish inmate grievance procedures. See Fla. Stat. Ann. § 944.09(1)(d) ("The department has authority to adopt rules . . . to implement its statutory authority. The rules must include rules relating to . . . grievance procedures which shall conform to 42 U.S.C. s. 1997e. "); id. § 944.331 ("The department shall establish by rule an inmate grievance procedure that must conform to the Minimum Standards for Inmate Grievance Procedures as promulgated by the United States Department of Justice pursuant to 42 U.S.C. s. 1997e. The department's office of general counsel shall oversee the grievance procedures established by the department."). **The DOC has established such grievance procedures. See Fla. Admin. Code Ann. §§ 33-103.001 to -103.019.** (emphasis added)

379 F. 3d 1278, 1287-1288 (11th Cir. 2004).

Resolution of Plaintiff's failure to exhaust administrative remedies for purposes of section 1997e(a) is a dispositive issue that must be fully and properly addressed before further proceedings on the merits occur. The Eleventh Circuit considers the proper determination of issues under 42 U.S.C. § 1997e(a) to be "a threshold matter" before considering the merits of a case. See id., at 1286. In Johnson, by accepting the Georgia wardens' interlocutory appeal, the Court considered the exhaustion issue to be a controlling question of law to which an immediate appeal from the district court's order could "materially advance the ultimate termination of the litigation" warranting resolution of the differences of legal opinions. See 28 U.S.C. 1292(b). A difference of opinion by this Court as to the effect of Johnson on this case would likewise constitute a controlling

question of law under 28 U.S.C. 1292(b) for which an immediate appeal from the order could materially advance the ultimate termination of the litigation. Thus, Defendants alternatively request certification of an interlocutory appeal of the Court's order denying Defendants' motion to dismiss (Doc. 42) or the instant motion for reconsideration with a stay of further proceedings pending final resolution of the appeal.

CONCLUSION

Plaintiff did not administratively exhaust any of the issues raised in his complaint through the Department's designated grievance procedure. Pursuant to section 1997e(a), and in light of the Eleventh Circuit's interpretation of the administrative exhaustion in Johnson, Plaintiff's complaint must be dismissed for failure to exhaust administrative remedies.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Ramon Armas Borroto X27467 at Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026-1230 on this 19th day of August, 2005.

/s/ Joy A. Stubbs
Assistant Attorney General